Supreme Court, U.S.
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NO. 90-1900

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1990

11126 BALTIMORE BLVD., INC.

(T/A WARWICK BOOKS),

Petitioner,

v.

PRINCE GEORGE'S COUNTY, MARYLAND,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Respondent is dissatisfied with the question presented for review as set forth in the Petition for a Writ of Certiorari and submits the following as a substitution:

> WAS THE COURT OF APPEALS CORRECT IN DISMISSING AS MOOT A CONSTITUTIONAL CHALLENGE TO THE COUNTY'S ADULT BOOKSTORE ZONING ORDINANCE, IN LIGHT OF SUBSTANTIAL AMENDMENTS ENACTED DURING THE APPEAL PROCESS?

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STATEMENT OF THE CASE

The Prince George's County Council enacted zoning regulations governing adult bookstores in 1975, and modified those regulations in 1976 and 1980, 1987 and 1988.[1] Council Bill 156-1975, enacted on November 18, 1975, set forth the purpose of the adult bookstore legislation and established the standards to which such stores are required to conform. The preamble to the 1975 bill stated, in part, that its purpose was to "limit the location of

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[1] This case deals with the 1987 ordinance. Except where specifically stated to the contrary, all references are to the 1987 version of the adult bookstore ordinance.

adult bookstores" to certain commercial zones, to require a special exception before a bookstore could be located in those commercial areas specifically zoned for adult bookstores, and to require "that [then] existing adult bookstores be modified in order to lessen their impact on the community." An adult bookstore was defined as

> Any commercial establishment that has twenty-five percent (25%) or more of its stock in books, periodicals, photographs, drawings, sculpture, motion pictures, films or other visual representations which depict sadomasochistic abuse, sexual conduct or sexual excitement as defined by Article 27 Section 416A of the Annotated Code of Maryland and does not otherwise qualify as a theatre or nonprofit free lending library.

Council Bill 156-1975 S 1. In 1980, that definition was changed by reducing the stock percentage from 25 to 5 percent. Council Bill 116-1980.

The County's Zoning Ordinance generally provides that a special exception (including an application for an adult bookstore) may be approved if:

(1) The proposed use and site plan are in harmony with the purpose of this subtitle;
(2) The proposed use is in conformance with all the applicable requirements and regulations of this subtitle;
(3) The proposed use will not substantially impair the integrity of any validly approved Master Plan or Functional Master Plan, or, in the absence of a Master Plan or Functional Master Plan, the General Plan;
(4) The proposed use will not adversely affect the health, safety, or welfare of residents or workers in the area; and
(5) The proposed use will not be detrimental to the use or development of adjacent properties or the general neighborhood.

Prince George's County Code S 27-317.

The Zoning Ordinance also placed specific operational and locational

conditions on adult bookstores, including set-back restrictions (limiting proximity to schools, libraries, parks, playgrounds, and churches), sign and advertising limitations, and window-blackening requirements. County Code SS 27-248 and 27-331.

The court of appeals concisely and clearly described the "special exception" process as applied in zoning cases, including those for adult bookstores.

> Briefly, a special exception application begins with a review for compliance with zoning ordinances by the Technical Staff in the Zoning Division of the Planning Commission which issues a "Technical Staff Report" recommending approval, conditional approval or denial of the application. The application may be passed on to the County Planning Board and then reviewed in a public hearing before a Zoning Hearing

> Examiner. A Hearing Examiner's written decision may be appealed to Prince George's County Council, sitting as the District Council. The Council entertains oral argument and reviews the administrative record before making a final decision. The Council's final decision may be appealed to the Circuit Court for Prince George's County.

11126 Baltimore Blvd. v. Prince George's County, Maryland, 886 F.2d 1415, 1418 (4th Cir. 1989), set forth at APX.40-41.

Petitioner's bookstore began operations in June, 1975. APX. 116. After the first adult bookstore ordinance was passed, the petitioner reduced its stock in adult material to less than 25% so as to avoid classification as an adult bookstore. APX. 116-17. After the 1980 amendments, the County asked petitioner to reduce its adult stock to less than five percent or to obtain a special

exception, but petitioner did not do so. APX. 117. On July 2, 1985, the petitioner was cited for violating the ordinance when an inspection concluded that all of the stock on display was within the defined description and that petitioner did not have a special exception. APX. 117. On September 18, 1985, the Board of Zoning Appeals found there to be a violation and ordered petitioner to cease operation as an adult bookstore. APX. 117-18.

Petitioner appealed that order to the Circuit Court for Prince George's County. Petitioner's landlord filed an eviction action after receiving notice of the zoning violation, and the County filed court actions against both the petitioner and its landlord to enforce the Board of Zoning Appeals order. APX.

118. Petitioner then filed the present action in the United States District Court, and all other proceeding were stayed pending resolution of this case. APX. 118-19.

The district court found that the ordinance was a valid, content-neutral, "time, place and manner" regulation of such businesses. 11126 Baltimore Blvd. v. Prince George's County, 684 F.Supp. 884, 893 (D.Md. 1988), set forth at APX.137. However, the district court ruled that the ordinance was unconstitutional in two respects. First, the district court held that, while sufficient evidence exists to substantiate a finding that such businesses have negative secondary effects and the ordinance was directed at addressing these negative secondary

effects, the County Council had not received all this evidence prior to its vote, so the ordinance was unconstitutional. APX.152-54. The district court also struck down the ordinance because the criteria established for issuance of a special exception were vague and "subject to possible manipulation and arbitrary application by officials who might object to the contents of the materials sold at adult bookstores." APX.166.

As to the issue of time limits, the district court noted a lack of any evidence presented by the plaintiff. It also found no prior restraint in light of evidence that the application process normally takes six months, during which time the adult bookstores are allowed to continue operations. APX.168-69, n. 31.

The U.S. Court of Appeals for the Fourth Circuit then examined the ordinance in depth and found it to be completely constitutional. APX.32-99. After agreeing with the district court's finding that the ordinance was a content neutral time, place and manner regulation, APX.53, the court of appeals addressed the sufficiency of the legislative basis for the regulation. After reviewing other cases on this issue, the court of appeals concluded that "there was less evidence before the City of Renton when its ordinance was enacted [subsequently upheld in City of Renton v. Playtime Theatres, 475 U.S. 41 (1986)] than in the record developed by Prince George's County when it enacted and amended the challenged ordinances." APX.68. As for the evidence submitted

in the district court but not received by the County Council prior to its vote, the court of appeals observed that

> cursory review of the case law reveals that courts have routinely admitted evidence at trial to supplement a legislative record or explain the stated interest behind challenged regulations. It would appear from reviewing the Renton case, for example, that testimony of this nature was admitted at trial and considered on appeal.

APX.78. Thus, the court of appeals held "that the County sufficiently demonstrated substantial governmental interest in its regulations." APX.80.

On the issue of vague criteria subject to manipulation, the court of appeals was "persuaded by the language of the challenged ordinances, the evidence in the record, and Maryland case law that the special exception requirements...do not confer unbridled

discretion upon County Council and zoning administrators." APX.91. The court also concurred in the district court's finding that the length of the process did not constitute a prior restraint. APX.94. Thus, the judgment of the district court was reversed, and the ordinance found to be constitutional. APX.99.

On June 4, 1990, this Court issued a per curiam order directing that the court of appeals decision be vacated and remanded for further consideration in light of FW/PBS, Inc. dba Paris Adult Bookstore II v. City of Dallas, 493 U.S. 215 (1990). APX.15. After oral argument on the remand, the Fourth Circuit found the case to be moot in light of substantial amendments to the ordinance enacted during the appeal

process. APX.1-4. The petitioner now asks this Court to review the decision on that issue.

SUMMARY OF ARGUMENT

The decision of the United States Court of Appeals for the Fourth Circuit is in harmony with decisions by this Court and other federal courts of appeals. Thus, the Petition for a Writ of Certiorari should be denied.

ARGUMENT

Contrary to Petitioner's claim, the Fourth Circuit's decision in this case does not conflict with decisions of other circuits. The only case in which Petitioner sees a clear conflict, Finberg v. Sullivan, 658 F.2d 93 (3d Cir. 1980), is clearly distinguishable. That case, a suit by a social security recipient against a creditor, county sheriff and prothonotary, challenged the constitutionality of Pennsylvania's post judgment garnishment procedures. After losing in the Third Circuit, the defendants filed a notice of appeal to the Supreme Court and obtained a stay of the Third Circuit mandate. However they never docketed their appeal, despite an extension of time to do so. Instead they urged withdrawal of the adverse

Third Circuit opinion "in light of action recently taken by the Pennsylvania Supreme Court" to amend the challenged procedures. Finberg at 94-95.

In denying the motion for withdrawal, the Third Circuit pointed to several factors militating against a dismissal for mootness. Among these were the need to discourage manipulation of appellate proceedings, Finberg at 97, n.6; to determine what plaintiff class should be certified by the district court and thus whether the amended rules adequately address the rights of the entire class, Finberg at 98; and to ensure finality between the parties since the mooting event, amendment of the rules, was enacted by a non-party. Finberg at 99, n. 13. None of those

factors is present in this case, so there is conflict.

The alleged conflict with the First, Fifth and District of Columbia Circuits is even more illusory. Indeed, the Petitioner claims only that this case "appears to conflict" with decisions from those circuits, Petition at 12-13, and merely cites the decisions without any explanation as to how they conflict with the decision here. Petitions at 16-17. Indeed, the Petitioner concedes that the Fifth Circuit "decision" is merely an order to remand "without discussion" about mootness or any other issue. Petition at 20 and FW/PBS, Inc. v. City of Dallas, 896 F.2d 864 (5th Cir. 1990). Obviously, the Fourth Circuit's decision based on mootness cannot conflict with a

decision that does not address that issue. Nor is there a conflict with the other decisions Petitioner cites. Since Petitioner cannot or will not explicate a true conflict, Respondent will not burden the Court with lengthy discussions of the obvious absence of conflict.

U.S. Const. art. III, sec. 2 limits the exercise of the judicial power to cases and controversies. When an action becomes moot or academic it does not present a justiciable controversy within the case or controversy clause. Aetna Life Insurance Co. v. Haworth, 300 U.S. 227, 239-40, (1937). A federal court is without power to decide moot questions or to give advisory opinions which cannot affect the rights of the litigants in the case before it. United

States v. Alaska Steamship Co., 253 U.S. 113, 116, (1920), St. Pierre v. United States, 319 U.S. 41, 42 (1943). The case must retain its character as a present, live controversy in order to "avoid advisory opinions on abstract propositions of law." Hall v. Beals, 396 U.S. 45, 48, (1969) (per curiam). The actual controversy must exist at all stages of review, not merely at the time the complaint is filed. Preiser v. Newkirk, 422 U.S. 395, 401, (1975). This is true for declaratory judgments as well as other questions. Alabama State Fed. of Labor v. McAdory, 325 U.S. 450, 461 (1945), Golden v. Zwickler, 394 U.S. 103, (1969).

Although it would be difficult to formulate a precise test, this Court has stated that the basic question is

whether, under all the circumstances, there is a substantial controversy "of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273 (1941). And, because the purpose of an injunction is to prevent future violations, the

> moving party must satisfy the court that relief is needed. The necessary determination is that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive.

United States v. W.T. Grant Co. et al., 345 U.S. 629, 633, (1953).

Therefore, when it appears that the controversy has become entirely moot, it is the duty of the appellate court to set aside the judgment below and to

remand the cause with directions to dismiss. Duke Power Co. v. Greenwood County, S.C., 299 U.S. 259, 267 (1936), United States v. Munsingwear, Inc., 340 U.S. 36, 39 (1950). The Fourth Circuit Court of Appeals was correct in refusing to render an advisory opinion and dismissing this case for lack of jurisdiction. (APX. 1-5).

Petitioner argues that the Court of Appeals failed to meet the test for mootness as it was articulated by this Court in County of Los Angeles v. Davis, 440 U.S. 625, 631, (1979). That test is two-pronged and asks first whether there is no reasonable expectation that the alleged violation would recur and second, whether interim relief or events have completely and irrevocably eradicated the effects of the alleged

violation. 440 U.S. at 631. Although this Court has stated that "voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot..." by itself, United States v. W.T. Grant Co., 345 U.S. 629, 632 (1953), this reasoning is based on the assumption that a defendant may return to its prior position. In the case sub judice, this event is not likely to occur. Although Council Bill #131-1988 (APX. 16) stated that the County Council might rescind part of the new ordinance if the District Court's judgment was reversed, this was the intention as of November 29, 1988. (APX. 30). Subsequent events prevent the County Council from reenacting the original ordinance.

The main reason is because the ordinance, as applied to adult book stores, was held unconstitutional by the Court of Special Appeals of Maryland in Landover Books v. Prince George's County, 81 Md.App. 54, 566 A.2d 792 (1989). The Maryland Court stated that the guaranty of freedom of speech under the Maryland State Constitution is "substantially similar to that enunciated in the First Amendment and should not be interpreted differently." 81 Md.App. at ___, 566 A.2d at 804. However, the Court of Special Appeals disagreed with the rationale used by the United States Court of Appeals for the Fourth Circuit in Prince George's County v. 11126 Baltimore Boulevard, 886 F.2d 1415 (4th Cir. 1989), and held that the

subject ordinance was unconstitutional as applied to adult book stores.

The ordinance was modified on November 29, 1988 to include criteria similar, if not identical, to that specifically approved by the Maryland Court of Special Appeals in 5297 Pulaski Highway, Inc. v. Town of Perryville, 69 Md.App. 590, 519 A.2d 206 (1987). Therefore, it is unlikely that Prince George's County would reenact an ordinance which has been held to be unconstitutional by its State Court. In addition, legislation is now being drafted with an eye toward again amending the ordinance to provide for a specified period of time for the special exception process, in light of this Court's recent decision in FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, (1990).

There is no reason to assume that, in the absence of the Fourth Circuit's interpretation of FW/PBS, Inc. v. City of Dallas, the County Council will not amend the ordinance to comply with this recent decision. Because the subject ordinance is no longer in existence and there is no reasonable possibility that it will be reenacted, Petitioner's original request for declaratory and injunctive relief is moot.

Because the circumstances of this case fall within this Court's test for mootness as articulated in County of Los Angeles v. Davis, 440 U.S. 625, 99 S.Ct. 1379 (1979) and other cases, the Court of Appeals acted properly in its determination that the case was moot and that it could not render an advisory opinion. Petitioner has not

demonstrated any conflict among circuits nor asserted any special or important reasons why its Petition should be granted and it should therefore be denied.

CONCLUSION

For the reasons set forth above, the respondent respectfully requests that this Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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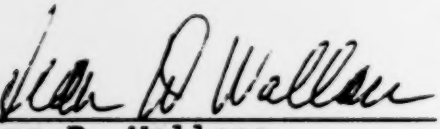
By: 

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APPENDIX A